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DEPARTMENT OF STATE

22 CFR Parts 120 and 126

RIN 1400-AD38

[Public Notice 8270]

Implementation of the Defense Trade Cooperation Treaty Between the United States and Australia.

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to implement the Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, identify via a supplement to the ITAR the defense articles and defense services that cannot be exported pursuant to the licensing exemption created by the Treaty, and make certain other corrections to the supplement.

DATES: This rule is effective upon the entry into force of the Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation. The Department will publish a final rule in the *Federal Register* providing the effective date of this rule.

FOR FURTHER INFORMATION CONTACT: Sarah Heidema, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2809 or e-mail DDTCResponseTeam@state.gov. ATTN: Regulatory Change – Treaties.

SUPPLEMENTARY INFORMATION:

The Department of State is amending the International Traffic in Arms Regulations (ITAR) pursuant to the Security Cooperation Act of 2010 (Public Law 111-266), with the inclusion of other changes. Title I of the Security Cooperation Act, the Defense Trade Cooperation Treaties Implementation Act of 2010, implements the Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation (Treaty Doc. 110-10), and the Treaty Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland Concerning Defense Trade

Cooperation (Treaty Doc. 110-7). The U.S.-UK treaty entered into force on April 13, 2012. (See “Implementation of the Defense Trade Cooperation Treaty Between the United States and the United Kingdom,” 77 FR 16592, and “Announcement of Entry Into Force of the Defense Trade Cooperation Treaty Between the United States and the United Kingdom,” 77 FR 33089.) This rule amends the ITAR with regard to the U.S.-Australia treaty (the “Treaty”).

ITAR §120.1 is amended to provide updated authorities and editorial changes. ITAR §120.33 is added to provide a definition of “Defense Trade Cooperation Treaty between the United States and Australia.” New ITAR §120.35 defines the Implementing Arrangement pursuant to the Treaty. ITAR §126.16 is added to create the licensing exemption and provide guidance on its use. Supplement No. 1 to part 126 is amended to identify defense articles that may not be exported and defense services that may not be furnished through the exemption.

In addition, the supplement is amended to make the following corrections and clarifications: the phrase, “defense articles and services related to” is removed from the row regarding USML Category I articles, and the USML citation for armored plates is changed from USML Category XIII(c) to XIII(e).

On November 22, 2011 (76 FR 72246, RIN 1400-AC95), the Department published for public comment a proposed rule to amend the ITAR to implement the Defense Trade Cooperation Treaty between the United States and the United Kingdom and the Defense Trade Cooperation Treaty between the United States and Australia, and to identify, via a supplement, the defense articles that may not be exported and the defense services that may not be furnished through use of the licensing exemptions created by the treaties. The comment period ended December 22, 2011. Fifteen parties filed comments that applied to the Treaty. The Department’s evaluation of the comments and recommendations follows.

The majority of commenting parties expressed support for the Treaty’s intention of facilitating defense exports with one of the United States’ closest allies. However, the commenting parties expressed concern that the exemption is overly complicated and its requirements too burdensome to be truly workable. The Department appreciates these

comments and believes the clarifying edits made in this final rule make application of the exemption clearer.

Several commenting parties requested additional guidance for various aspects of the exemption described in ITAR §126.16. As part of Treaty implementation, the Department's Directorate of Defense Trade Controls (DDTC) has posted Frequently Asked Questions (FAQs) on its website (www.pmddtc.state.gov). These FAQs address these requests for guidance.

Two commenting parties recommended that the Department add a definition for defense articles to ITAR §126.16(a)(1) to clarify that "defense articles" also includes technical data for purposes of the exemption. The Department does not believe this change is necessary as the definition for "defense articles" in ITAR §120.6 clearly identifies technical data as within its scope. Unless specifically indicated otherwise, the use of the term "defense article" includes technical data.

One commenting party requested clarification of the term "access" as used in ITAR §126.16(a)(1)(iv), indicating that it is common for U.S. Customs and Border Protection (CBP) to authorize a physical manipulation of a container, which would seemingly result in an intermediate consignee having "access" to an item in the shipment. The Department believes the meaning of "access" is plain, and does not include situations such as this, where there is a directive from a CBP official to open a container for the purpose as stated. Another party requested that the Department place in this section a reference to ITAR §126.16(k), which discusses intermediate consignees. The Department accepted this recommendation and has revised the section accordingly.

One commenting party expressed concern that the process by which the U.S. Government would obtain records, as provided in ITAR §126.16(l) and other sections of the exemption, is unclear. These sections are not intended to identify the process by which record requests are made, and therefore were not revised to provide this information. (The records-request process would be the same for ITAR §126.16(l) as for requests made pursuant to any other section of the ITAR.)

One commenting party noted that ITAR §126.16(a)(4) seemed to limit transfers just to exports to the United States. The Department has revised this section to clarify that it applies to transfers within the Approved Community.

Two commenting parties requested that the Department change the word “required” to “pursuant to” in ITAR §126.16(a)(4)(iii). This change was not accepted because the word “required” is a requirement of the Treaty.

In response to the recommendation of two commenting parties, the Department revised ITAR §126.16(a)(5) regarding the applicability of this exemption to defense articles delivered via the Foreign Military Sales program.

Three commenting parties recommended that the Department include an explanation of the vetting process for the Australian Community in ITAR §126.16(d). The Department did not accept this recommendation for the rule itself, but notes that the vetting requirements are identified in the Treaty and Implementing Arrangement, which are available on DDTC’s website.

Three commenting parties requested that the Department provide additional guidance on requesting confirmation of Treaty eligibility for operations, programs, and projects that cannot be publicly identified (*i.e.*, are classified). For this information, the Department refers inquiries by members of the approved community to both the DDTC website and the appropriate defense authority.

One commenting party inquired whether the Department will publish a complete list of U.S. Government contracts that are Treaty eligible. The Department will not do so. The U.S. Department of Defense has updated the Defense Federal Acquisition Regulation Supplement (DFARS) and certain contract clauses, which will identify Treaty eligibility when incorporated into a contract.

Three commenting parties requested that ITAR §126.16(g)(1) be clarified to indicate whether it applies to marketing to members of the Approved Community, or requested its removal. This provision is part of the Treaty’s Exempted Technology List, and therefore cannot be removed. However, the Department revised ITAR §126.16(g)(1) to indicate that marketing to members of the Australian Community is covered so long as it is for an approved Treaty end-use and meets the other requirements of this section.

One commenting party recommended removal of ITAR §126.16(g)(4) or, in the alternative, adding the parenthetical “(or foreign equivalent)” after “Milestone B.” The Department cannot remove this paragraph as it is part of the Treaty’s Exempted

Technology List. The Department also cannot add the parenthetical as there is no equivalent in Australia to “Milestone B.”

One commenting party requested changes to ITAR §126.16(g)(5) to allow for the export of embedded exempted technologies in certain circumstances. The Department is not, at this time, prepared to broaden this provision to include embedded exempted technologies.

Two commenting parties commented on the complexity of using ITAR §126.16(h) with a diverse supply chain and requested clarification on the applicability of ITAR §123.9(e) to this exemption. The Department appreciates the diverse nature of global supply chains, but believes the mechanisms provided in ITAR §126.16(h) are no more onerous than current retransfer or reexport requirements. Further, as indicated in ITAR §126.16(h)(5), any retransfer, reexport, or change in end-use under ITAR §126.16(h) shall be made in accordance with ITAR §123.9.

In response to the recommendation of two commenting parties, the Department has deleted “any citizen of such countries” from ITAR §126.16(h)(8).

Ten commenting parties commented on the marking requirements provided in ITAR §126.16(j). Of most concern was a perception that the requirements of this section made using the exemption overly burdensome and costly. Various suggestions were provided, ranging from removal of the requirement to rewording of certain sections. The majority of these commenting parties requested removal of the requirement in paragraph (j)(2) for exporters to remove Treaty markings. The Department appreciates these comments; however, apart from minor clarifying changes, the marking requirements have not been removed or revised because they are made pursuant to the Treaty and its Implementing Arrangement.

One commenting party requested that the Department revise the text of the statement required by ITAR §126.16(j)(5) to indicate that the items being exported are USML items and authorized only for export to Australia under the Treaty. The Department accepted this suggestion and revised the text accordingly.

One commenting party requested that registered brokers be included in ITAR §126.16(k)(1)(ii). Australian intermediate consignees must meet the requirements of this section. If a registered broker meets these requirements, then it may be an intermediate

consignee for purposes of this exemption. However, simply being a registered broker does not automatically qualify an entity as an Australian intermediate consignee.

One commenting party recommended changing “all exports” in ITAR §126.16(l)(1) to “their exports” to acknowledge that the U.S. exporter may not be aware or have record of a reexport/retransfer request submitted by an Australian Community member. The Department accepted this recommendation and has revised the section accordingly.

One commenting party requested clarification of whether ITAR §126.16(l)(1)(x) referred to the USML category or security classification. The Department revised this section to make clear that it refers to security classification.

The Department accepted the recommendation of one commenting party to remove reference to “defense services” in ITAR §126.16(l)(2).

Two commenting parties requested that the Department clarify whether ITAR §126.16(m) required exporters to submit negative reports. Reporting requirements under this section are contingent on meeting the requirements of ITAR §130.9.

Two commenting parties requested clarification on whether the congressional notification requirement under the Treaty is identical to that required under normal license authorization processes. The Department confirms that the requirement is the same.

Ten commenting parties submitted comments regarding the scope and text of Supplement No. 1 to part 126. In particular, comments indicated concern that the supplement was too broad and possibly excluded too much to make the exemption useful. The Department appreciates these comments, and has made clarifying edits to Supplement No. 1 to the extent possible within the confines of the Treaty, the Implementing Arrangement, and the Exempted Technology List.

For clarification, the Department has added, “prior to movement,” to the text of ITAR §126.16(j)(1), which is in conformance with the requirements of the Treaty’s Implementing Arrangement.

Having thoroughly reviewed and evaluated the written comments and recommended changes, the Department has determined that it will accept, and hereby

adopt with the noted changes, the proposed rule, as it pertained to the Treaty, as a final rule, to be effective when the Treaty enters into force.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

The Department of State is of the opinion that controlling the import and export of defense articles and services is a foreign affairs function of the United States government and that rules implementing this function are exempt from sections 553 (rulemaking) and 554 (adjudications) of the Administrative Procedure Act (APA). In addition, this rulemaking is implementing the provisions of a treaty between the United States and Australia and related amendments to the Arms Export Control Act. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department published this rule with a 30-day provision for public comment and without prejudice to its determination that controlling the import and export of defense services is a foreign affairs function (RIN 1400-AC95). This rule is effective upon the entry into force of the Treaty Between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation (Treaty Doc. 110-10). Once the Treaty is in force, exporters must be able to utilize the Treaty for qualifying exports of defense articles.

Regulatory Flexibility Act

Since the Department is of the opinion that this rule is exempt from the provisions of 5 U.S.C. 553, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal

governments, and will not preempt tribal law. Accordingly, the requirement of Executive Order 13175 does not apply to this rulemaking.

Small Business Regulatory Enforcement Fairness Act of 1996

This rulemaking is not a major rule within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996.

Executive Orders 12372 and 13132

This rulemaking will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rulemaking does not have sufficient federalism implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Department has reviewed this regulation to ensure its consistency with the regulatory philosophy and principles set forth in these executive orders. The Department also has determined that this rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866.

Executive Order 12988

The Department of State has reviewed this rulemaking in light of sections 3(a) and 3(b)(2) of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Paperwork Reduction Act

This rule does not impose any new reporting or recordkeeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Parts 120 and 126

Arms and Munitions, Exports.

Accordingly, for the reasons set forth above, Title 22, Chapter I, Subchapter M, parts 120 and 126 are amended as follows:

PART 120 – PURPOSE AND DEFINITIONS

1. The authority citation for part 120 is revised to read as follows:

Authority: Secs. 2, 38, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2797); 22 U.S.C. 2794; 22 U.S.C. 2651a; Pub. L. 105–261, 112 Stat. 1920; Pub. L. 111–266; Section 1261, Pub. L. 112-239; E.O. 13637, 78 FR 16129.

2. Section 120.1 is amended by revising paragraph (a) to read as follows:

§120.1 General authorities and eligibility.

(a) Section 38 of the Arms Export Control Act (22 U.S.C. 2778), as amended, authorizes the President to control the export and import of defense articles and defense services. The statutory authority of the President to promulgate regulations with respect to exports of defense articles and defense services was delegated to the Secretary of State by Executive Order 13637. This subchapter implements that authority. By virtue of delegations of authority by the Secretary of State, these regulations are primarily administered by the Deputy Assistant Secretary of State for Defense Trade and Regional Security and the Managing Director of the Directorate of Defense Trade Controls, Bureau of Political-Military Affairs.

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3. Section 120.33 is added to read as follows:

§120.33 Defense Trade Cooperation Treaty between the United States and Australia.

Defense Trade Cooperation Treaty between the United States and Australia means the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Sydney, September 5, 2007. For additional information on making exports pursuant to this treaty, *see* §126.16 of this subchapter.

4. Section 120.35 is added to read as follows:

§120.35 Australia Implementing Arrangement.

Australia Implementing Arrangement means the Implementing Arrangement Pursuant to the Treaty between the Government of the United States of America and the Government of Australia Concerning Defense Trade Cooperation, done at Washington, March 14, 2008, as it may be amended.

PART 126 – GENERAL POLICIES AND PROVISIONS

5. The authority citation for part 126 is revised to read as follows:

Authority: Secs. 2, 38, 40, 42, and 71, Pub. L. 90–629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108–375; Sec. 7089, Pub. L. 111–117; Pub. L. 111–266; Section 7045, Pub. L. 112–74; Section 7046, Pub. L. 112–74; E.O. 13637, 78 FR 16129.

6. Section 126.16 is added to read as follows:

§126.16 Exemption pursuant to the Defense Trade Cooperation Treaty between the United States and Australia.

(a) *Scope of exemption and required conditions.* (1) *Definitions.* (i) An *export* means, for purposes of this section only, the initial movement of defense articles or defense services from the United States Community to the Australian Community.

(ii) A *transfer* means, for purposes of this section only, the movement of a previously exported defense article or defense service by a member of the Australian Community within the Australian Community, or between a member of the United States Community and a member of the Australian Community.

(iii) *Retransfer and reexport* have the meaning provided in §120.19 of this subchapter.

(iv) *Intermediate consignee* means, for purposes of this section, an entity or person who receives, but does not have access to, defense articles, including technical data, for the sole purpose of effecting onward movement to members of the Approved Community (*see* paragraph (k) of this section).

(2) Persons or entities exporting or transferring defense articles or defense services are exempt from the otherwise applicable licensing requirements if such persons or entities comply with the regulations set forth in this section. Except as provided in Supplement No. 1 to part 126 of this subchapter, Port Directors of U.S. Customs and Border Protection and postmasters shall permit the permanent and temporary export without a

license from members of the United States Community to members of the Australian Community (*see* paragraph (d) of this section regarding the identification of members of the Australian Community) of defense articles and defense services not listed in Supplement No. 1 to part 126 of this subchapter, for the end-uses specifically identified pursuant to paragraphs (e) and (f) of this section. The purpose of this section is to specify the requirements to export, transfer, reexport, retransfer, or otherwise dispose of a defense article or defense service pursuant to the Defense Trade Cooperation Treaty between the United States and Australia. All persons must continue to comply with statutory and regulatory requirements outside of this subchapter concerning the import of defense articles and defense services or the possession or transfer of defense articles, including, but not limited to, regulations issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives found at 27 CFR parts 447, 478, and 479, which are unaffected by the Defense Trade Cooperation Treaty between the United States and Australia.

(3) *Export.* In order for an exporter to export a defense article or defense service pursuant to the Defense Trade Cooperation Treaty between the United States and Australia, all of the following conditions must be met:

- (i) The exporter must be registered with the Directorate of Defense Trade Controls (DDTC) and must be eligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to obtain an export license (or other forms of authorization to export) from any agency of the U.S. Government without restriction (*see* paragraphs (b) and (c) of this section for specific requirements);
- (ii) The recipient of the export must be a member of the Australian Community (*see* paragraph (d) of this section regarding the identification of members of the Australian Community). Australian non-governmental entities and facilities that become ineligible for such membership will be removed from the Australian Community;
- (iii) Intermediate consignees involved in the export must not be ineligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to handle or receive a defense article or defense service without restriction (*see* paragraph (k) of this section for specific requirements);

(iv) The export must be for an end-use specified in the Defense Trade Cooperation Treaty between the United States and Australia and mutually agreed to by the U.S. Government and the Government of Australia pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and the Implementing Arrangement thereto (the Australia Implementing Arrangement) (*see* paragraphs (e) and (f) of this section regarding authorized end-uses);

(v) The defense article or defense service is not excluded from the scope of the Defense Trade Cooperation Treaty between the United States and Australia (*see* paragraph (g) of this section and Supplement No. 1 to part 126 of this subchapter for specific information on the scope of items excluded from export under this exemption) and is marked or identified, at a minimum, as “Restricted USML” (*see* paragraph (j) of this section for specific requirements on marking exports);

(vi) All required documentation of such export is maintained by the exporter and recipient and is available upon the request of the U.S. Government (*see* paragraph (l) of this section for specific requirements); and

(vii) The Department of State has provided advance notification to the Congress, as required, in accordance with this section (*see* paragraph (o) of this section for specific requirements).

(4) *Transfers.* In order for a member of the Approved Community (*i.e.*, the United States Community and Australian Community) to transfer a defense article or defense service under the Defense Trade Cooperation Treaty within the Approved Community, all of the following conditions must be met:

(i) The defense article or defense service must have been previously exported in accordance with paragraph (a)(3) of this section or transitioned from a license or other approval in accordance with paragraph (i) of this section;

(ii) The transferor and transferee of the defense article or defense service are members of the Australian Community (*see* paragraph (d) of this section regarding the identification of members of the Australian Community) or the United States Community (*see* paragraph (b) of this section for information on the United States Community/approved exporters);

(iii) The transfer is required for an end-use specified in the Defense Trade Cooperation Treaty between the United States and Australia and mutually agreed to by the Government of the United States and the Government of Australia pursuant to the terms of the Defense Trade Cooperation Treaty between the United States and Australia and the Australia Implementing Arrangement (*see* paragraphs (e) and (f) of this section regarding authorized end-uses);

(iv) The defense article or defense service is not identified in paragraph (g) of this section and Supplement No. 1 to part 126 of this subchapter as ineligible for export under this exemption, and is marked or otherwise identified, at a minimum, as “Restricted USML” (*see* paragraph (j) of this section for specific requirements on marking exports);

(v) All required documentation of such transfer is maintained by the transferor and transferee and is available upon the request of the U.S. Government (*see* paragraph (l) of this section for specific requirements); and

(vi) The Department of State has provided advance notification to the Congress in accordance with this section (*see* paragraph (o) of this section for specific requirements).

(5) This section does not apply to the export of defense articles or defense services from the United States pursuant to the Foreign Military Sales program. Once such items are delivered to the Australian Government, they may be treated as if they were exported pursuant to the Treaty and then must be marked, identified, transmitted, stored and handled in accordance with the Treaty, the Australia Implementing Arrangement, and the provisions of this section.

(b) *United States Community.* The following persons compose the United States Community and may export or transfer defense articles and defense services pursuant to the Defense Trade Cooperation Treaty between the United States and Australia:

(1) Departments and agencies of the U.S. Government, including their personnel acting in their official capacity, with, as appropriate, a security clearance and a need-to-know; and

(2) Non-governmental U.S. persons registered with DDTC and eligible, according to the requirements and prohibitions of the Arms Export Control Act, this subchapter, and other provisions of United States law, to obtain an export license (or other forms of authorization to export) from any agency of the U.S. Government without restriction,

including their employees acting in their official capacity with, as appropriate, a security clearance and a need-to-know.

(c) An exporter that is otherwise an authorized exporter pursuant to paragraph (b) of this section may not export or transfer pursuant to the Defense Trade Cooperation Treaty between the United States and Australia if the exporter's president, chief executive officer, any vice-president, any other senior officer or official (*e.g.*, comptroller, treasurer, general counsel); any member of the board of directors of the exporter; any party to the export; or any source or manufacturer is ineligible to receive export licenses (or other forms of authorization to export) from any agency of the U.S. Government.

(d) *Australian Community*. For purposes of the exemption provided by this section, the Australian Community consists of:

(1) Government of Australia authorities with entities identified as members of the Approved Community through the DDTC website at the time of a transaction under this section; and

(2) The non-governmental Australian entities and facilities identified as members of the Approved Community through the DDTC website at the time of a transaction under this section; non-governmental Australian entities and facilities that become ineligible for such membership will be removed from the Australian Community.

(e) *Authorized End-uses*. The following end-uses, subject to paragraph (f) of this section, are specified in the Defense Trade Cooperation Treaty between the United States and Australia:

(1) United States and Australian combined military or counter-terrorism operations;

(2) United States and Australian cooperative security and defense research, development, production, and support programs;

(3) Mutually determined specific security and defense projects where the Government of Australia is the end-user; or

(4) U.S. Government end-use.

(f) Procedures for identifying authorized end-uses pursuant to paragraph (e) of this section:

(1) Operations, programs, and projects that can be publicly identified will be posted on the DDTC website;

- (2) Operations, programs, and projects that cannot be publicly identified will be confirmed in written correspondence from DDTC; or
- (3) U.S. Government end-use will be identified specifically in a U.S. Government contract or solicitation as being eligible under the Treaty.
- (4) No other operations, programs, projects, or end-uses qualify for this exemption.
- (g) *Items eligible under this section.* With the exception of items listed in Supplement No. 1 to part 126 of this subchapter, defense articles and defense services may be exported under this section subject to the following:
- (1) An exporter authorized pursuant to paragraph (b)(2) of this section may market a defense article to members of the Australian Community if that exporter has been licensed by DDTC to export (as defined by §120.17 of this subchapter) the identical type of defense article to any foreign person and end-use of the article is for an end-use identified in paragraph (e) of this section.
- (2) The export of any defense article specific to the existence of (*e.g.*, reveals the existence of or details of) anti-tamper measures made at U.S. Government direction always requires prior written approval from DDTC.
- (3) U.S.-origin classified defense articles or defense services may be exported only pursuant to a written request, directive, or contract from the U.S. Department of Defense that provides for the export of the classified defense article(s) or defense service(s).
- (4) U.S.-origin defense articles specific to developmental systems that have not obtained written Milestone B approval from the U.S. Department of Defense milestone approval authority are not eligible for export unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified pursuant to paragraph (e)(1), (2), or (4) of this section.
- (5) Defense articles excluded by paragraph (g) of this section or Supplement No. 1 to part 126 of this subchapter (*e.g.*, USML Category XI (a)(3) electronically scanned array radar excluded by Note 2) that are embedded in a larger system that is eligible to ship under this section (*e.g.*, a ship, an aircraft) must separately comply with any restrictions placed on that embedded defense article under this subchapter. The exporter must obtain a license or other authorization from DDTC for the export of such embedded defense articles (for example, USML Category XI (a)(3) electronically scanned array radar

systems that are exempt from this section that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from DDTC for their export, transfer, reexport, or retransfer).

(6) No liability shall be incurred by or attributed to the U.S. Government in connection with any possible infringement of privately owned patent or proprietary rights, either domestic or foreign, by reason of an export conducted pursuant to this section.

(7) Sales by exporters made through the U.S. Government shall not include either charges for patent rights in which the U.S. Government holds a royalty-free license, or charges for information which the U.S. Government has a right to use and disclose to others, which is in the public domain, or which the U.S. Government has acquired or is entitled to acquire without restrictions upon its use and disclosure to others.

(h) *Transfers, retransfers, and reexports.* (1) Any transfer of a defense article or defense service not exempted in Supplement No.1 to part 126 of this subchapter by a member of the Australian Community (*see* paragraph (d) of this section for specific information on the identification of the Community) to another member of the Australian Community or the United States Community for an end-use that is authorized by this exemption (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) is authorized under this exemption.

(2) Any transfer or other provision of a defense article or defense service for an end-use that is not authorized by the exemption provided by this section is prohibited without a license or the prior written approval of DDTC (*see* paragraphs (e) and (f) of this section regarding authorized end-uses).

(3) Any retransfer or reexport, or other provision of a defense article or defense service by a member of the Australian Community to a foreign person that is not a member of the Australian Community, or to a U.S. person that is not a member of the United States Community, is prohibited without a license or the prior written approval of DDTC (*see* paragraph (d) of this section for specific information on the identification of the Australian Community).

(4) Any change in the use of a defense article or defense service previously exported, transferred, or obtained under this exemption by any foreign person, including a member of the Australian Community, to an end-use that is not authorized by this exemption is

prohibited without a license or other written approval of DDTC (*see* paragraphs (e) and (f) of this section regarding authorized end-uses).

(5) Any retransfer, reexport, or change in end-use requiring such approval of the U.S. Government shall be made in accordance with §123.9 of this subchapter.

(6) Defense articles excluded by paragraph (g) of this section or Supplement No. 1 to part 126 of this subchapter (*e.g.*, USML Category XI (a)(3) electronically scanned array radar systems) that are embedded in a larger system that is eligible to ship under this section (*e.g.*, a ship, an aircraft) must separately comply with any restrictions placed on that embedded defense article unless otherwise specified. A license or other authorization must be obtained from DDTC for the export, transfer, reexport, retransfer, or change in end-use of any such embedded defense article (for example, USML Category XI(a)(3) electronically scanned array radar systems that are excluded from this section by Supplement No. 1 to part 126 of this subchapter, Note 2 that are incorporated in an aircraft that is eligible to ship under this section continue to require separate authorization from DDTC for their export, transfer, reexport, or retransfer).

(7) A license or prior approval from DDTC is not required for a transfer, retransfer, or reexport of an exported defense article or defense service under this section, if:

(i) The transfer of defense articles or defense services is made by a member of the United States Community to Australian Department of Defence (ADOD) elements deployed outside the Territory of Australia and engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section (Note: For purposes of paragraph (h)(7)(i) through (iv) of this section, per Section 9(9) of the Australia Implementing Arrangement, “ADOD Transmission channels” includes electronic transmission of a defense article and transmission of a defense article by an ADOD contracted carrier or freight forwarder that merely transports or arranges transport for the defense article in this instance.);

(ii) The transfer of defense articles or defense services is made by a member of the United States Community to an Approved Community member (either United States or Australian) that is operating in direct support of ADOD elements deployed outside the Territory of Australia and engaged in an authorized end-use (*see* paragraphs (e) and (f) of

this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section;

(iii) The reexport is made by a member of the Australian Community to ADOD elements deployed outside the Territory of Australia engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section;

(iv) The reexport is made by a member of the Australian Community to an Approved Community member (either United States or Australian) that is operating in direct support of ADOD elements deployed outside the Territory of Australia engaged in an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses) using ADOD transmission channels or the provisions of this section; or

(v) The defense article or defense service will be delivered to the ADOD for an authorized end-use (*see* paragraphs (e) and (f) of this section regarding authorized end-uses); the ADOD may deploy the item as necessary when conducting official business within or outside the Territory of Australia. The item must remain under the effective control of the ADOD while deployed and access may not be provided to unauthorized third parties.

(8) U.S. persons registered, or required to be registered, pursuant to part 122 of this subchapter and members of the Australian Community must immediately notify DDTC of any actual or proposed sale, retransfer, or reexport of a defense article or defense service on the U.S. Munitions List originally exported under this exemption to any of the countries listed in §126.1 of this subchapter or any person acting on behalf of such countries, whether within or outside the United States. Any person knowing or having reason to know of such a proposed or actual sale, reexport, or retransfer shall submit such information in writing to the Office of Defense Trade Controls Compliance, Directorate of Defense Trade Controls.

(i) *Transitions.* (1) Any previous export of a defense article under a license or other approval of the U.S. Department of State remains subject to the conditions and limitations of the original license or authorization unless DDTC has approved in writing a transition to this section.

(2) If a U.S. exporter desires to transition from an existing license or other approval to the use of the provisions of this section, the following is required:

(i) The U.S. exporter must submit a written request to DDTC, which identifies the defense articles or defense services to be transitioned, the existing license(s) or other authorizations under which the defense articles or defense services were originally exported, and the Treaty-eligible end-use for which the defense articles or defense services will be used. Any license(s) filed with U.S. Customs and Border Protection should remain on file until the exporter has received approval from DDTC to retire the license(s) and transition to this section. When this approval is conveyed to U.S. Customs and Border Protection by DDTC, the license(s) will be returned to DDTC by U.S. Customs and Border Protection in accord with existing procedures for the return of expired licenses in §123.22(c) of this subchapter.

(ii) Any license(s) not filed with U.S. Customs and Border Protection must be returned to DDTC with a letter citing approval by DDTC to transition to this section as the reason for returning the license(s).

(3) If a member of the Australian Community desires to transition defense articles received under an existing license or other approval to the processes established under the Treaty, the Australian Community member must submit a written request to the Government of Australia. The Government of Australia will submit the request to DDTC for review and approval. The defense article or defense service shall remain subject to the conditions and limitations of the existing license or other approval until the Australian Community member has received via the Government of Australia the approval from DDTC.

(4) Authorized exporters identified in paragraph (b)(2) of this section who have exported a defense article or defense service that has subsequently been placed on the list of exempted items in Supplement No. 1 to part 126 of this subchapter must review and adhere to the requirements in the relevant *Federal Register* notice announcing such removal. Once removed, the defense article or defense service will no longer be subject to this section, and such defense article or defense service previously exported shall remain on the U.S. Munitions List and be subject to the requirements of this subchapter

unless the applicable *Federal Register* notice states otherwise. Subsequent reexport or retransfer must be made pursuant to §123.9 of this subchapter.

(5) Any defense article or defense service transitioned from a license or other approval to treatment under this section must be marked in accordance with the requirements of paragraph (j) of this section.

(j) *Marking of exports.* (1) All defense articles and defense services exported or transitioned pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section shall be marked or identified prior to movement as follows:

(i) For classified defense articles and defense services the standard marking or identification shall read “//CLASSIFICATION LEVEL USML//REL AUS and USA Treaty Community//.” For example, for defense articles classified SECRET, the marking or identification shall be “//SECRET USML//REL AUS and USA Treaty Community//.”

(ii) Unclassified defense articles and defense services exported under or transitioned pursuant to this section shall be handled while in Australia as “Restricted USML” and the standard marking or identification shall read “//RESTRICTED USML//REL AUS and USA Treaty Community//.”

(2) Where U.S.-origin defense articles are returned to a member of the United States Community identified in paragraph (b) of this section, any defense articles marked or identified pursuant to paragraph (j)(1)(ii) of this section as “//RESTRICTED USML//REL AUS and USA Treaty Community//” will be considered unclassified and the marking or identification shall be removed; and

(3) The standard marking and identification requirements are as follows:

(i) Defense articles (other than technical data) shall be individually labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section; or, where such labeling is impracticable (*e.g.*, propellants, chemicals), shall be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings as detailed in paragraphs (j)(1)(i) and (j)(1)(ii) of this section;

(ii) Technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (physical, oral, or electronic), shall be individually labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section; or, where such

labeling is impractical shall be accompanied by documentation (such as contracts or invoices) or verbal notification clearly associating the technical data with the appropriate markings as detailed in paragraphs (j)(1)(i) and (j)(1)(ii) of this section; and

(4) Defense services shall be accompanied by documentation (contracts, invoices, shipping bills, or bills of lading) clearly labeled with the appropriate identification detailed in paragraphs (j)(1) and (j)(2) of this section.

(5) The exporter shall incorporate the following statement as an integral part of the bill of lading and the invoice whenever defense articles are to be exported:

“These U.S. Munitions List commodities are authorized by the U.S. Government under the U.S.-Australia Defense Trade Cooperation Treaty for export only to Australia for use in approved projects, programs or operations by members of the Australian Community. They may not be retransferred or reexported or used outside of an approved project, program, or operation, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.”

(k) *Intermediate consignees.* (1) Unclassified exports under this section may only be handled by:

(i) U.S. intermediate consignees who are:

(A) Exporters registered with DDTC and eligible;

(B) Licensed customs brokers who are subject to background investigation and have passed a comprehensive examination administered by U.S. Customs and Border Protection; or

(C) Commercial air freight and surface shipment carriers, freight forwarders, or other parties not exempt from registration under §129.3(b)(3) of this subchapter, that are identified at the time of export as being on the U.S. Department of Defense Civil Reserve Air Fleet (CRAF) list of approved air carriers, a link to which is available on the DDTC website; or

(ii) Australian intermediate consignees who are:

(A) Members of the Australian Community; or

(B) Freight forwarders, customs brokers, commercial air freight and surface shipment carriers, or other Australian parties that are identified at the time of export as being on the

list of Authorized Australian Intermediate Consignees, which is available on the DDTC website.

(2) Classified exports must comply with the security requirements of the National Industrial Security Program Operating Manual (DoD 5220.22-M and supplements or successors).

(l) *Records.* (1) All exporters authorized pursuant to paragraph (b)(2) of this section who export defense articles or defense services pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section shall maintain detailed records of their exports, imports, and transfers. Exporters shall also maintain detailed records of any reexports and retransfers approved or otherwise authorized by DDTC of defense articles or defense services subject to the Defense Trade Cooperation Treaty between the United States and Australia and this section. These records shall be maintained for a minimum of five years from the date of export, import, transfer, reexport, or retransfer and shall be made available upon request to DDTC or a person designated by DDTC (e.g., the Diplomatic Security Service) or U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection. Records in an electronic format must be maintained using a process or system capable of reproducing all records on paper. Such records when displayed on a viewer, monitor, or reproduced on paper, must exhibit a high degree of legibility and readability. (For the purpose of this section, “legible” and “legibility” mean the quality of a letter or numeral that enables the observer to identify it positively and quickly to the exclusion of all other letters or numerals. “Readable” and “readability” means the quality of a group of letters or numerals being recognized as complete words or numbers.). These records shall consist of the following:

- (i) Port of entry/exit;
- (ii) Date of export/import;
- (iii) Method of export/import;
- (iv) Commodity code and description of the commodity, including technical data;
- (v) Value of export;
- (vi) Reference to this section and justification for export under the Treaty;
- (vii) End-user/end-use;

- (viii) Identification of all U.S. and foreign parties to the transaction;
- (ix) How the export was marked;
- (x) Security classification of the export;
- (xi) All written correspondence with the U.S. Government on the export;
- (xii) All information relating to political contributions, fees, or commissions furnished or obtained, offered, solicited, or agreed upon as outlined in paragraph (m) of this section;
- (xiii) Purchase order or contract;
- (xiv) Technical data actually exported;
- (xv) The Internal Transaction Number for the Electronic Export Information filing in the Automated Export System;
- (xvi) All shipping documentation (including, but not limited to the airway bill, bill of lading, packing list, delivery verification, and invoice); and
- (xvii) Statement of Registration (Form DS-2032).

(2) *Filing of export information.* All exporters of defense articles under the Defense Trade Cooperation Treaty between the United States and Australia and this section must electronically file Electronic Export Information (EEI) using the Automated Export System citing one of the four below referenced codes in the appropriate field in the EEI for each shipment:

- (i) For exports in support of United States and Australian combined military or counter-terrorism operations identify §126.16(e)(1) (the name or an appropriate description of the operation shall be placed in the appropriate field in the EEI, as well);
- (ii) For exports in support of United States and Australian cooperative security and defense research, development, production, and support programs identify §126.16(e)(2) (the name or an appropriate description of the program shall be placed in the appropriate field in the EEI, as well);
- (iii) For exports in support of mutually determined specific security and defense projects where the Government of Australia is the end-user identify §126.16(e)(3) (the name or an appropriate description of the project shall be placed in the appropriate field in the EEI, as well); or
- (iv) For exports that will have a U.S. Government end-use identify §126.16(e)(4) (the U.S. Government contract number or solicitation number (*e.g.*, “U.S. Government

contract number XXXXX”) shall be placed in the appropriate field in the EEI, as well). Such exports must meet the required export documentation and filing guidelines, including for defense services, of §123.22(a), (b)(1), and (b)(2) of this subchapter.

(m) *Fees and commissions.* All exporters authorized pursuant to paragraph (b)(2) of this section shall, with respect to each export, transfer, reexport, or retransfer, pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section, submit a statement to DDTC containing the information identified in §130.10 of this subchapter relating to fees, commissions, and political contributions on contracts or other instruments valued in an amount of \$500,000 or more.

(n) *Violations and enforcement.* (1) Exports, transfers, reexports, and retransfers that do not comply with the conditions prescribed in this section will constitute violations of the Arms Export Control Act and this subchapter, and are subject to all relevant criminal, civil, and administrative penalties (*see* §127.1 of this subchapter), and may also be subject to penalty under other statutes or regulations.

(2) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers may take appropriate action to ensure compliance with this section as to the export or the attempted export of any defense article or technical data, including the inspection of loading or unloading of any vessel, vehicle, or aircraft.

(3) U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection officers have the authority to investigate, detain, or seize any export or attempted export of defense articles or technical data that does not comply with this section or that is otherwise unlawful.

(4) DDTC or a person designated by DDTC (*e.g.*, the Diplomatic Security Service), U.S. Immigration and Customs Enforcement, or U.S. Customs and Border Protection may require the production of documents and information relating to any actual or attempted export, transfer, reexport, or retransfer pursuant to this section. Any foreign person refusing to provide such records within a reasonable period of time shall be suspended from the Australian Community and ineligible to receive defense articles or defense services pursuant to the exemption under this section or otherwise.

(o) *Procedures for legislative notification.* (1) Exports pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section by any

person identified in paragraph (b)(2) of this section shall not take place until 30 days after DDTC has acknowledged receipt of a written notification from the exporter notifying the Department of State if the export involves one or more of the following:

- (i) A contract or other instrument for the export of major defense equipment in the amount of \$25,000,000 or more, or for defense articles and defense services in the amount of \$100,000,000 or more;
- (ii) A contract for the export of firearms controlled under Category I of the U.S. Munitions List of the International Traffic in Arms Regulations in an amount of \$1,000,000 or more;
- (iii) A contract, regardless of value, for the manufacturing abroad of any item of significant military equipment (*see* §120.7 of this subchapter); or
- (iv) An amended contract that meets the requirements of paragraphs (o)(1)(i) through (o)(1)(iii) of this section.

(2) The written notification required in paragraph (o)(1) of this section shall indicate the item/model number, general item description, U.S. Munitions List category, value, and quantity of items to be exported pursuant to the Defense Trade Cooperation Treaty between the United States and Australia and this section, and shall be accompanied by the following additional information:

- (i) The information identified in §130.10 and §130.11 of this subchapter;
- (ii) A statement regarding whether any offset agreement is final to be entered into in connection with the export and a description of any such offset agreement;
- (iii) A copy of the signed contract; and
- (iv) If the notification is for paragraph (o)(1)(ii) of this section, a statement of what will happen to the weapons in their inventory (for example, whether the current inventory will be sold, reassigned to another service branch, destroyed, etc.).

(3) The Department of State will notify the Congress of exports that meet the requirements of paragraph (o)(1) of this section.

7. Supplement No. 1 to part 126 is revised to read as follows:

Supplement No. 1 to Part 126*				
USML Category	Exclusion	(CA) §126.5	(AS) §126.16	(UK) §126.17
I-XXI	Classified defense articles and services. <i>See</i> Note 1.	X	X	X
I-XXI	Defense articles listed in the Missile Technology Control Regime (MTCR) Annex.	X	X	X
I-XXI	U.S. origin defense articles and services used for marketing purposes and not previously licensed for export in accordance with this subchapter.		X	X
I-XXI	Defense services for or technical data related to defense articles identified in this supplement as excluded from the Canadian exemption.	X		
I-XXI	Any transaction involving the export of defense articles and services for which congressional notification is required in accordance with §123.15 and §124.11 of this subchapter.	X		
I-XXI	U.S. origin defense articles and services specific to developmental systems that have not obtained written Milestone B approval from the U.S. Department of Defense milestone approval authority, unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of §126.16 or §126.17 of this subchapter and is consistent with other exclusions of this supplement.		X	X
I-XXI	Nuclear weapons strategic delivery systems and all components, parts, accessories, and attachments specifically designed for such systems and associated equipment.	X		
I-XXI	Defense articles and services specific to the existence or method of compliance with anti-tamper measures, where such measures are readily identifiable, made at originating Government direction.		X	X

I-XXI	Defense articles and services specific to reduced observables or counter low observables in any part of the spectrum. <i>See</i> Note 2.		X	X
I-XXI	Defense articles and services specific to sensor fusion beyond that required for display or identification correlation. <i>See</i> Note 3.		X	X
I-XXI	Defense articles and services specific to the automatic target acquisition or recognition and cueing of multiple autonomous unmanned systems.		X	X
I-XXI	Nuclear power generating equipment or propulsion equipment (<i>e.g.</i> , nuclear reactors), specifically designed for military use and components therefore, specifically designed for military use. <i>See</i> also §123.20 of this subchapter.			X
I-XXI	Libraries (parametric technical databases) specially designed for military use with equipment controlled on the USML. <i>See</i> Note 13.			X
I-XXI	Defense services or technical data specific to applied research as defined in §125.4(c)(3) of this subchapter, design methodology as defined in §125.4(c)(4) of this subchapter, engineering analysis as defined in §125.4(c)(5) of this subchapter, or manufacturing know-how as defined in §125.4(c)(6) of this subchapter. <i>See</i> Note 12.	X		
I-XXI	Defense services other than those required to prepare a quote or bid proposal in response to a written request from a department or agency of the United States Federal Government or from a Canadian Federal, Provincial, or Territorial Government; or defense services other than those required to produce, design, assemble, maintain or service a defense article for use by a registered U.S. company, or a U.S. Federal Government Program, or for end-use in a Canadian Federal, Provincial, or Territorial Government Program. <i>See</i> Note 14.	X		
I	Firearms, close assault weapons, and combat shotguns.	X		

II(k)	Software source code related to USML Categories II(c), II(d), or II(i). <i>See</i> Note 4.		X	X
II(k)	Manufacturing know-how related to USML Category II(d). <i>See</i> Note 5.	X	X	X
III	Ammunition for firearms, close assault weapons, and combat shotguns listed in USML Category I.	X		
III	Defense articles and services specific to ammunition and fuse setting devices for guns and armament controlled in USML Category II.			X
III(e)	Manufacturing know-how related to USML Categories III(d)(1) or III(d)(2) and their specially designed components. <i>See</i> Note 5.	X	X	X
III(e)	Software source code related to USML Categories III(d)(1) or III(d)(2). <i>See</i> Note 4.		X	X
IV	Defense articles and services specific to man-portable air defense systems (MANPADS). <i>See</i> Note 6.	X	X	X
IV	Defense articles and services specific to rockets, designed or modified for non-military applications that do not have a range of 300 km (<i>i.e.</i> , not controlled on the MTCR Annex).			X
IV	Defense articles and services specific to torpedoes.		X	X
IV	Defense articles and services specific to anti-personnel landmines. <i>See</i> Note 15.	X	X	X
IV	Defense articles and services specific to cluster munitions. <i>See</i> Note 16.	X	X	X
IV(i)	Software source code related to USML Categories IV(a), IV(b), IV(c), or IV(g). <i>See</i> Note 4.		X	X
IV(i)	Manufacturing know-how related to USML Categories IV(a), IV(b), IV(d), or IV(g) and their specially designed components. <i>See</i> Note 5.	X	X	X
V	The following energetic materials and related substances: a. TATB (triaminotrinitrobenzene) (CAS 3058-38-6); b. Explosives controlled in USML Category V(a)(32) or V(a)(33); c. Iron powder (CAS 7439-89-6) with particle size of 3 micrometers or less produced by reduction of iron oxide			X

	<p>with hydrogen;</p> <p>d. BOBBA-8 (bis(2-methylaziridinyl)2-(2-hydroxypropanoxy) propylamino phosphine oxide), and other MAPO derivatives;</p> <p>e. N-methyl-p-nitroaniline (CAS 100-15-2); or</p> <p>Trinitrophenylmethylnitramine (tetryl) (CAS 479-45-8).</p>			
V(c)(7)	Pyrotechnics and pyrophorics specifically formulated for military purposes to enhance or control radiated energy in any part of the IR spectrum.			X
V(d)(3)	Bis-2, 2-dinitropropylnitrate (BDNPN).			X
VI	Defense articles specific to cryogenic equipment, and specially designed components or accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (-170°C).			X
VI	Defense Articles specific to superconductive electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.			X
VI	Defense articles and services specific to naval technology and systems relating to acoustic spectrum control and awareness. <i>See Note 10.</i>		X	X
VI(a)	Nuclear powered vessels.	X	X	X
VI(c)	Defense articles and services specific to submarine combat control systems.		X	X
VI(d)	Harbor entrance detection devices.			X
VI(e)	Defense articles and services specific to naval nuclear propulsion equipment. <i>See</i>	X	X	X

	Note 7.			
VI(g)	Technical data and defense services for gas turbine engine hot sections related to USML Category VI(f). <i>See</i> Note 8.	X	X	X
VI(g)	Software source code related to USML Categories VI(a) or VI(c). <i>See</i> Note 4.		X	X
VII	Defense articles specific to cryogenic equipment, and specially designed components or accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (-170°C).			X
VII	Defense articles specific to superconductive electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.			X
VII	Armored all wheel drive vehicles fitted with, or designed or modified to be fitted with, a plough or flail for the purpose of land mine clearance, other than vehicles specifically designed or modified for military use.			X
VII(e)	Amphibious vehicles.			X
VII(f)	Technical data and defense services for gas turbine engine hot sections. <i>See</i> Note 8.	X	X	X
VIII	Defense articles specific to cryogenic equipment, and specially designed components and accessories therefor, specially designed or configured to be installed in a vehicle for military ground, marine, airborne or space applications, capable of operating while in motion and of producing or maintaining temperatures below 103 K (-170°C).			X
VIII	Defense articles specific to superconductive			X

	electrical equipment (rotating machinery and transformers) specially designed or configured to be installed in a vehicle for military ground, marine, airborne, or space applications and capable of operating while in motion. This, however, does not include direct current hybrid homopolar generators that have single-pole normal metal armatures which rotate in a magnetic field produced by superconducting windings, provided those windings are the only superconducting component in the generator.			
VIII(a)	All USML Category VIII(a) items.	X		
VIII(b)	Defense articles and services specific to gas turbine engine hot section components and digital engine controls. <i>See</i> Note 8.		X	X
VIII(f)	Developmental aircraft, engines and components identified in USML Category VIII(f).	X		
VIII(g)	Ground Effect Machines (GEMS).			X
VIII(i)	Technical data and defense services for gas turbine engine hot sections and digital engine controls related to USML Category VIII(b). <i>See</i> Note 8.	X	X	X
VIII(i)	Manufacturing know-how related to USML Categories VIII(a), VIII(b), or VIII(e) and their specially designed components. <i>See</i> Note 5.	X	X	X
VIII(i)	Software source code related to USML Categories VIII(a) or VIII(e). <i>See</i> Note 4.		X	X
IX	Training or simulation equipment for Man Portable Air Defense Systems (MANPADS). <i>See</i> Note 6.		X	X
IX(e)	Software source code related to USML Categories IX(a) or IX(b). <i>See</i> Note 4.		X	X
IX(e)	Software that is both specifically designed or modified for military use and specifically designed or modified for modeling or simulating military operational scenarios.			X
X(e)	Manufacturing know-how related to USML Categories X(a)(1) or X(a)(2) and their specially designed components. <i>See</i> Note 5.	X	X	X
XI(a)	Defense articles and services specific to countermeasures and counter-countermeasures <i>See</i> Note 9.		X	X
XI(a)	High Frequency and Phased Array		X	

	Microwave Radar systems, with capabilities such as search, acquisition, tracking, moving target indication, and imaging radar systems. <i>See Note 17.</i>			
XI	Defense articles and services specific to naval technology and systems relating to acoustic spectrum control and awareness. <i>See Note 10.</i>		X	X
XI(b) XI(c) XI(d)	Defense articles and services specific to USML Category XI (b) (<i>e.g.</i> , communications security (COMSEC) and TEMPEST).		X	X
XI(d)	Software source code related to USML Category XI(a). <i>See Note 4.</i>		X	X
XI(d)	Manufacturing know-how related to USML Categories XI(a)(3) or XI(a)(4) and their specially designed components. <i>See Note 5.</i>	X	X	X
XII	Defense articles and services specific to countermeasures and counter-countermeasures. <i>See Note 9.</i>		X	X
XII	Defense articles and services specific to USML Category XII(c) articles, except any 1st- and 2nd-generation image intensification tubes and 1st- and 2nd-generation image intensification night sighting equipment. End items in XII(c) and related technical data limited to basic operations, maintenance, and training information as authorized under the exemption in §125.4(b)(5) of this subchapter may be exported directly to a Canadian Government entity (<i>i.e.</i> , federal, provincial, territorial, or municipal) consistent with §126.5, other exclusions, and the provisions of this subchapter.	X		
XII	Technical data or defense services for night vision equipment beyond basic operations, maintenance, and training data. However, the AS and UK Treaty exemptions apply when such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of §126.16 or §126.17 of this subchapter and is consistent with other exclusions of this supplement.	X	X	X

XII(f)	Manufacturing know-how related to USML Category XII(d) and their specially designed components. <i>See</i> Note 5.	X	X	X
XII(f)	Software source code related to USML Categories XII(a), XII(b), XII(c), or XII(d). <i>See</i> Note 4.		X	X
XIII(b)	Defense articles and services specific to USML Category XIII(b) (Military Information Security Assurance Systems).		X	X
XIII(d)	Carbon/carbon billets and preforms which are reinforced in three or more dimensional planes, specifically designed, developed, modified, configured or adapted for defense articles.			X
XIII(e)	Defense articles and services specific to armored plate manufactured to comply with a military standard or specification or suitable for military use. <i>See</i> Note 11.			X
XIII(f)	Structural materials specifically designed, developed, modified, configured or adapted for defense articles.			X
XIII(g)	Defense articles and services related to concealment and deception equipment and materials.			X
XIII(h)	Energy conversion devices other than fuel cells.			X
XIII(i)	Metal embrittling agents.			X
XIII(j)	Defense articles and services related to hardware associated with the measurement or modification of system signatures for detection of defense articles as described in Note 2.		X	X
XIII(k)	Defense articles and services related to tooling and equipment specifically designed or modified for the production of defense articles identified in USML Category XIII(b).		X	X
XIII(l)	Software source code related to USML Category XIII(a). <i>See</i> Note 4.		X	X
XIV	Defense articles and services related to toxicological agents, including chemical agents, biological agents, and associated equipment.		X	X
XIV(a) XIV(b) XIV(d)	Chemical agents listed in USML Category XIV(a), (d) and (e), biological agents and biologically derived substances in USML	X		

XIV(e) XIV(f)	Category XIV(b), and equipment listed in USML Category XIV(f) for dissemination of the chemical agents and biological agents listed in USML Category XIV(a), (b), (d), and (e).			
XV(a)	Defense articles and services specific to spacecraft/satellites. However, the Canadian exemption may be used for commercial communications satellites that have no other type of payload.	X	X	X
XV(b)	Defense articles and services specific to ground control stations for spacecraft telemetry, tracking, and control. Defense articles and services are not excluded under this entry if they do not control the spacecraft. Receivers for receiving satellite transmissions are also not excluded under this entry.		X	X
XV(c)	Defense articles and services specific to GPS/PPS security modules.		X	X
XV(c)	Defense articles controlled in USML Category XV(c) except end items for end-use by the Federal Government of Canada exported directly or indirectly through a Canadian-registered person.	X		
XV(d)	Defense articles and services specific to radiation-hardened microelectronic circuits.	X	X	X
XV(e)	Anti-jam systems with the ability to respond to incoming interference by adaptively reducing antenna gain (nulling) in the direction of the interference.	X		
XV(e)	Antennas having any of the following: <ul style="list-style-type: none"> a. Aperture (overall dimension of the radiating portions of the antenna) greater than 30 feet; b. All sidelobes less than or equal to -35 dB relative to the peak of the main beam; or c. Designed, modified, or configured to provide coverage area on the surface of the earth less than 200 nautical miles in diameter, where “coverage area” is defined as that area on the surface of the earth that is illuminated by the main beam width of the antenna (which is the angular 	X		

	distance between half power points of the beam).			
XV(e)	Optical intersatellite data links (cross links) and optical ground satellite terminals.	X		
XV(e)	Spaceborne regenerative baseband processing (direct up and down conversion to and from baseband) equipment.	X		
XV(e)	Propulsion systems which permit acceleration of the satellite on-orbit (<i>i.e.</i> , after mission orbit injection) at rates greater than 0.1 g.	X		
XV(e)	Attitude control and determination systems designed to provide spacecraft pointing determination and control or payload pointing system control better than 0.02 degrees per axis.	X		
XV(e)	All specifically designed or modified systems, components, parts, accessories, attachments, and associated equipment for all USML Category XV(a) items, except when specifically designed or modified for use in commercial communications satellites.	X		
XV(e)	Defense articles and services specific to spacecraft and ground control station systems (only for telemetry, tracking and control as controlled in USML Category XV(b)), subsystems, components, parts, accessories, attachments, and associated equipment.		X	X
XV(f)	Technical data and defense services directly related to the other defense articles excluded from the exemptions for USML Category XV.	X	X	X
XVI	Defense articles and services specific to design and testing of nuclear weapons.	X	X	X
XVI(c)	Nuclear radiation measuring devices manufactured to military specifications.	X		
XVI(e)	Software source code related to USML Category XVI(c). <i>See</i> Note 4.		X	X
XVII	Classified articles and defense services not elsewhere enumerated. <i>See</i> Note 1.	X	X	X
XVIII	Defense articles and services specific to directed energy weapon systems.		X	X
XX	Defense articles and services related to submersible vessels, oceanographic, and	X	X	X

	associated equipment.			
XXI	Miscellaneous defense articles and services.	X	X	X
<p><u>Note 1:</u> Classified defense articles and services are not eligible for export under the Canadian exemptions. U.S. origin defense articles and services controlled in USML Category XVII are not eligible for export under the UK Treaty exemption. U.S. origin classified defense articles and services are not eligible for export under either the UK or AS Treaty exemptions except when being released pursuant to a U.S. Department of Defense written request, directive, or contract that provides for the export of the defense article or service.</p>				
<p><u>Note 2:</u> The phrase “any part of the spectrum” includes radio frequency (RF), infrared (IR), electro-optical, visual, ultraviolet (UV), acoustic, and magnetic. Defense articles related to reduced observables or counter reduced observables are defined as:</p> <p>a. Signature reduction (radio frequency (RF), infrared (IR), Electro-Optical, visual, ultraviolet (UV), acoustic, magnetic, RF emissions) of defense platforms, including systems, subsystems, components, materials (including dual-purpose materials used for Electromagnetic Interference (EM) reduction), technologies, and signature prediction, test and measurement equipment and software and material transmissivity/reflectivity prediction codes and optimization software.</p> <p>b. Electronically scanned array radar, high power radars, radar processing algorithms, periscope-mounted radar systems (PATRIOT), LADAR, multistatic and IR focal plane array-based sensors, to include systems, subsystems, components, materials, and technologies.</p>				
<p><u>Note 3:</u> Defense Articles related to sensor fusion beyond that required for display or identification correlation is defined as techniques designed to automatically combine information from two or more sensors/sources for the purpose of target identification, tracking, designation, or passing of data in support of surveillance or weapons engagement. Sensor fusion involves sensors such as acoustic, infrared, electro optical, frequency, etc. Display or identification correlation refers to the combination of target detections from multiple sources for assignment of common target track designation.</p>				
<p><u>Note 4:</u> Software source code beyond that source code required for basic operation, maintenance, and training for programs, systems, and/or subsystems is not eligible for use of the UK or AS Treaty exemptions, unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of §126.16 or §126.17 of this subchapter and is consistent with other exclusions of this supplement.</p>				
<p><u>Note 5:</u> Manufacturing know-how, as defined in §125.4(c)(6) of this subchapter, is not eligible for use of the UK or AS Treaty exemptions, unless such export is pursuant to a written solicitation or contract issued or awarded by the U.S. Department of Defense for an end-use identified in paragraph (e)(1), (e)(2), or (e)(4) of §126.16 or §126.17 of this subchapter and is consistent with other exclusions of this supplement.</p>				
<p><u>Note 6:</u> Defense Articles specific to Man Portable Air Defense Systems (MANPADS) includes missiles which can be used without modification in other applications. It also includes production and test equipment and components specifically designed or modified for MANPAD systems, as well as training equipment specifically designed or modified for MANPAD systems.</p>				

Note 7: Naval nuclear propulsion plants includes all of USML Category VI(e). Naval nuclear propulsion information is technical data that concerns the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, and repair of the propulsion plants of naval nuclear-powered ships and prototypes, including the associated shipboard and shore-based nuclear support facilities. Examples of defense articles covered by this exclusion include nuclear propulsion plants and nuclear submarine technologies or systems; nuclear powered vessels (*see* USML Categories VI and XX).

Note 8: A complete gas turbine engine with embedded hot section components or digital engine controls is eligible for export or transfer under the Treaties. Technical data, other than required for routine external maintenance and operation, related to the hot section or digital engine controls, as well as individual hot section components are not eligible for the Treaty exemption whether shipped separately or accompanying a complete engine. Examples of gas turbine engine hot section exempted defense article components and technology are combustion chambers/liners; high pressure turbine blades, vanes, disks and related cooled structure; cooled low pressure turbine blades, vanes, disks and related cooled structure; advanced cooled augmenters; and advanced cooled nozzles. Examples of gas turbine engine hot section developmental technologies are Integrated High Performance Turbine Engine Technology (IHPTET), Versatile, Affordable Advanced Turbine Engine (VAATE), Ultra-Efficient Engine Technology (UEET).

Note 9: Examples of countermeasures and counter-countermeasures related to defense articles not exportable under the AS or UK Treaty exemptions are:

- a. IR countermeasures;
- b. Classified techniques and capabilities;
- c. Exports for precision radio frequency location that directly or indirectly supports fire control and is used for situation awareness, target identification, target acquisition, and weapons targeting and Radio Direction Finding (RDF) capabilities. Precision RF location is defined as angle of arrival accuracy of less than five degrees (RMS) and RF emitter location of less than ten percent range error;
- d. Providing the capability to reprogram; and
- e. Acoustics (including underwater), active and passive countermeasures, and counter-countermeasures.

Note 10: Examples of defense articles covered by this exclusion include underwater acoustic vector sensors; acoustic reduction; off-board, underwater, active and passive sensing, propeller/propulsor technologies; fixed mobile/floating/powered detection systems which include in-buoy signal processing for target detection and classification; autonomous underwater vehicles capable of long endurance in ocean environments (manned submarines excluded); automated control algorithms embedded in on-board autonomous platforms which enable (a) group behaviors for target detection and classification, (b) adaptation to the environment or tactical situation for enhancing target detection and classification; "intelligent autonomy" algorithms which define the status, group (greater than 2) behaviors, and responses to detection stimuli by autonomous, underwater vehicles; and low frequency, broad-band "acoustic color," active acoustic "fingerprint" sensing for the purpose of long range, single pass identification of ocean bottom objects, buried or otherwise (controlled under Category USML XI(a)(1), (a)(2),

(b), (c), and (d)).

Note 11: This exclusion does not apply to the platforms (*e.g.*, vehicles) for which the armored plates are applied. For exclusions related to the platforms, reference should be made to the other exclusions in this list, particularly for the category in which the platform is controlled.

The excluded defense articles include constructions of metallic or non-metallic materials or combinations thereof specially designed to provide protection for military systems. The phrase “suitable for military use” applies to any articles or materials which have been tested to level IIIA or above IAW NIJ standard 0108.01 or comparable national standard. This exclusion does not include military helmets, body armor, or other protective garments which may be exported IAW the terms of the AS or UK Treaty.

Note 12: Defense services or technical data specific to applied research (§125.4(c)(3) of this subchapter), design methodology (§125.4(c)(4) of this subchapter), engineering analysis (§125.4(c)(5) of this subchapter), or manufacturing know-how (§125.4(c)(6) of this subchapter) are not eligible for export under the Canadian exemptions. However, this exclusion does not include defense services or technical data specific to build-to-print as defined in §125.4(c)(1) of this subchapter, build/design-to-specification as defined in §125.4(c)(2) of this subchapter, or basic research as defined in §125.4(c)(3) of this subchapter, or maintenance (*i.e.*, inspection, testing, calibration or repair, including overhaul, reconditioning and one-to-one replacement of any defective items parts or components, but excluding any modification, enhancement, upgrade or other form of alteration or improvement that changes the basic performance of the item) of non-excluded defense articles which may be exported subject to other exclusions or terms of the Canadian exemptions.

Note 13: The term “libraries” (parametric technical databases) means a collection of technical information of a military nature, reference to which may enhance the performance of military equipment or systems.

Note 14: In order to utilize the authorized defense services under the Canadian exemption, the following must be complied with:

(a) The Canadian contractor and subcontractor must certify, in writing, to the U.S. exporter that the technical data and defense services being exported will be used only for an activity identified in Supplement No. 1 to part 126 of this subchapter and in accordance with §126.5 of this subchapter; and

(b) A written arrangement between the U.S. exporter and the Canadian recipient must:

1. Limit delivery of the defense articles being produced directly to an identified manufacturer in the United States registered in accordance with part 122 of this subchapter; a department or agency of the United States Federal Government; a Canadian-registered person authorized in writing to manufacture defense articles by and for the Government of Canada; a Canadian Federal, Provincial, or Territorial Government;
2. Prohibit the disclosure of the technical data to any other contractor or subcontractor who is not a Canadian-registered person;
3. Provide that any subcontract contain all the limitations of §126.5 of this subchapter;
4. Require that the Canadian contractor, including subcontractors, destroy or return

to the U.S. exporter in the United States all of the technical data exported pursuant to the contract or purchase order upon fulfillment of the contract, unless for use by a Canadian or United States Government entity that requires in writing the technical data be maintained. The U.S. exporter must be provided written certification that the technical data is being retained or destroyed; and

5. Include a clause requiring that all documentation created from U.S. origin technical data contain the statement that, "This document contains technical data, the use of which is restricted by the U.S. Arms Export Control Act. This data has been provided in accordance with, and is subject to, the limitations specified in §126.5 of the International Traffic in Arms Regulations (ITAR). By accepting this data, the consignee agrees to honor the requirements of the ITAR."

(c) The U.S. exporter must provide the Directorate of Defense Trade Controls a semi-annual report of all their on-going activities authorized under §126.5 of this subchapter. The report shall include the article(s) being produced; the end-user(s); the end item into which the product is to be incorporated; the intended end-use of the product; the name and address of all the Canadian contractors and subcontractors.

Note 15: This exclusion does not apply to demining equipment in support of the clearance of landmines and unexploded ordnance for humanitarian purposes. As used in this exclusion, "anti-personnel landmine" means any mine placed under, on, or near the ground or other surface area, or delivered by artillery, rocket, mortar, or similar means or dropped from an aircraft and which is designed to be detonated or exploded by the presence, proximity, or contact of a person; any device or material which is designed, constructed, or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act; any manually-emplaced munition or device designed to kill, injure, or damage and which is actuated by remote control or automatically after a lapse of time.

Note 16: The cluster munitions that are subject to this exclusion are set forth below: The Convention on Cluster Munitions, signed December 3, 2008, and entered into force on August 1, 2010, defines a "cluster munition" as:

A conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions.

Under the Convention, a "cluster munition" does not include the following munitions:

- (a) A munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff; or a munition designed exclusively for an air defense role;
- (b) A munition or submunition designed to produce electrical or electronic effects;
- (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:

- 1. Each munition contains fewer than ten explosive submunitions;
- 2. Each explosive submunition weighs more than four kilograms;
- 3. Each explosive submunition is designed to detect and engage a single target object;
- 4. Each explosive submunition is equipped with an electronic self-destruction mechanism; and
- 5. Each explosive submunition is equipped with an electronic self-deactivating

feature.

Pursuant to U.S. law (Public Law 111-117, section 7055(b)), no military assistance shall be furnished for cluster munitions, no defense export license for cluster munitions may be issued, and no cluster munitions or cluster munitions technology shall be sold or transferred, unless:

(a) The submunitions of the cluster munitions, after arming, do not result in more than 1 percent unexploded ordnance across the range of intended operational environments; and

(b) The agreement applicable to the assistance, transfer or sale of such cluster munitions or cluster munitions technology specifies that the cluster munitions will only be used against clearly defined military targets and will not be used where civilians are known to be present or in areas normally inhabited by civilians.

Note 17: The radar systems described are controlled in USML Category XI(a)(3)(i) through (v). As used in this entry, the term “systems” includes equipment, devices, software, assemblies, modules, components, practices, processes, methods, approaches, schema, frameworks, and models.

* An “X” in the chart indicates that the item is excluded from use under the exemption referenced in the top of the column. An item excluded in any one row is excluded regardless of whether other rows may contain a description that would include the item.

April 5, 2013

(Date)

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